IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

TUESDAY, THE 10TH APRIL 2007 / 20TH CHAITHRA 1929

FAO.No. 223 of 2005()

APPELLANT/PETITIONER/DEFENDANT

CHITHRA PRAHLADAN, W/O.PRAHLADAN,
KANDESWARAM DESOM, IRINJALAKUDA VILLAGE,
MUKUNDAPURAM TALUK.

BY ADV. SRI.G.SREEKUMAR (CHELUR)

RESPONDENTS: RESPONDENT/PLAINTIFF

N.PAKAJAKSHAN PILLAI, S/O.N.K.SANKARAN
NAIR, RESIDING AT 'SOUPARNIKA',HOUSE NO.6/100 OF
IRINJALAKUDA MUNICIPALITY,AYYANKAVU TEMPLE ROAD,
IRINJALAKUDA.

BY ADV. SRI.T.N.MANOJ

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 10/04/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KURIAN JOSEPH & K.T. SANKARAN, JJ.

F.A.O. NO. 223 OF 2005

Dated this the 10th day of April, 2007

JUDGMENT

Sankaran, J.

The first defendant in O.S. No. 369 of 2002 on the file of the Court of the Principal Subordinate Judge of Irinjalakuda, challenges the order dismissing her application under Rule 13 of Order IX of the Code of Civil Procedure.

2. The respondent herein instituted the suit against the appellant and her son for realization of Rs. 3,59,984/- with interest. The plaintiff contended that the defendants executed a promissory note for Rs. 2,63,000/- in his favour. The amount claimed in the suit is the amount covered by the promissory note and interest upto the date of the suit.

3. Before instituting the suit, a notice was issued by the plaintiff to the defendants. It is submitted that the defendants sent a reply denying the

execution of the promissory note. The plaintiff had filed an application for attachment before judgment. In that application, the defendants filed a counter statement and disputed the genuineness of the promissory note. It was contended that the plaintiff and the defendants are neighbours. The husband of the first defendant was working away. The plaintiff was helping the first defendant to get loans from banks. For that purpose, the plaintiff had obtained blank signed papers from the defendants. The appellant stated that the promissory note was fabricated using those signed papers.

4. The suit was filed on 18-9-2002. Though the defendants filed objections in the application for attachment before judgment on 23-9-2002, they did not file written statement. The suit was posted to 13.1.2003 for filing written statement. On that day, the counsel for the defendants reported no instructions. The defendants were set exparte. The suit was decreed exparte on 31-1-2003.

5. The first defendant filed I.A. No. 4061 of 2004 to set aside the exparte decree and I.A. No. 4059 of 2004 to condone the delay of 669 days in filing the application to set aside the exparte decree. The court below dismissed the applications by the order impugned in the Appeal.

6. In the application to condone the delay, the appellant stated that his son was meeting the lawyer for conducting the case. The son of the appellant went abroad. The Advocate who was appearing for the appellant shifted his practice to the High Court. The appellant was examined as P.W. 1 before the court below. She explained the circumstances in which the suit happened to be decreed exparte. The court below held that the 2nd defendant did not apply for setting aside the exparte decree and he was not made a party in the application filed by the appellant. It was held that this is a serious defect. The court below also noticed that the appellant had engaged two Advocates

and though one of them shifted practice to the High Court, the other counsel was available at the station. It was also noticed that though there was a representation that written statement was being filed, no written statement was in fact filed. The court below held that the 2nd defendant went abroad only in January 2004 and therefore the reason stated by the appellant for condoning the delay cannot be accepted.

7. After having heard the counsel for the parties in detail, we are of the view that an opportunity could be afforded to the appellant to contest the case after setting aside the exparte decree, to meet the ends of justice. It is to be noted that the appellant had put forward her defence in the objections filed by her in the application for attachment before judgment. She had also sent a reply notice stating her case. The reply notice is not produced by the plaintiff in evidence. There is no discussion in the judgment about the merits of the case. The judgment was passed only on the ground that the defendants were set exparte. In

the light of the contentions put forward by the defendants in the objections to the application for attachment before judgment, the trial court could have considered the merits of the case. Though the court below cannot be faulted in holding that the delay is not explained in a satisfactory manner, the fact remains that the appellant did not get an opportunity to contest the case on the merits. In the facts and circumstances of the case and in the light of the contentions put forward by the appellant in the objections to the application for attachment before judgment, we are of the view that in the interests of justice, the appellant should be granted an opportunity to file written statement and contest the case.

8. However, we are not inclined to set aside the exparte decree without any conditions. It is appropriate to direct the appellant to deposit Rs.3,59,984/-, the amount claimed in the plaint, as a condition for setting aside the exparte decree. It is also just and necessary to compensate the respondent by

awarding costs of Rs. 5,000/- for the inconvenience caused to him.

9. For the aforesaid reasons, the Appeal is allowed, the order impugned is set aside and I.A. Nos. 4059 of 2004 and 4061 of 2004 are allowed on the following conditions:

(a) The appellant shall deposit before the trial court a sum of Rs. 3,59,984/- (Rupees three lakhs fifty nine thousand nine hundred and eighty four only) on or before 31-5-2007; and

(b) The appellant shall pay a sum of Rs. 5,000/- (Rupees five thousand only) as costs to the respondent on or before 31-5-2007.

(c) If the appellant fails to comply with any of the above conditions within the stipulated time, the F.A.O. shall stand dismissed and the order impugned shall stand confirmed.

The parties shall appear before the trial court on 24-5-2007. The appellant shall file written statement within two weeks from the date fixed for appearance of

the parties. The trial court shall dispose of the suit expeditiously and at any rate within six months from the date fixed for appearance of parties, needless to say, untrammelled by any of the observations contained in this judgment. Send back the records forthwith.

(KURIAN JOSEPH)
Judge

(K.T.SANKARAN)
Judge

KURIAN JOSEPH&
K.T.SANKARAN, JJ.

F.A.O.NO. 223 OF 2005

JUDGMENT

10th April, 2007